Supreme Court, U.S.
FILED
04-730 NOV 22 2004
OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

ROBERT L. DEVER,

Petitioner,

v.

HENTZEN COATINGS, INC., SHERWIN-WILLIAMS COMPANY, W.M. BARR & COMPANY, INC., LHB INDUSTRIES, INC., HILL MANUFACTURING COMPANY, INC., NILES CHEMICAL PAINT COMPANY, INC., CHASE PRODUCTS COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether due process is denied under the Federal Rules, where a litigant is not afforded discovery on personal jurisdiction issues prior to a court dismissing for lack of personal jurisdiction when the Complaint establishes a *prima facie* case of jurisdiction.

2. Whether the Arkansas Legislature's adoption of a long-arm statute which directs its courts to exercise personal jurisdiction to the fullest extent allowed by the Due Process clause of the United States Constitution is undermined by the Eighth Circuit's dismissal of a Complaint which set forth a prima facie case of jurisdiction.

PARTIES TO THE PROCEEDINGS

Petitioner

1. The Petitioner in this case is Robert L. Dever, an individual. Petitioner states he is not subject to the provisions of Rule 29.6 since he is not a non-governmental corporation.

Respondent

2. Respondents are Hentzen Coatings, Inc., W. M. Barr & Company, Niles Chemical Paint Company, Inc. and Chase Products Company.

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Petitioner, Robert L. Dever, requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 23, 2004.

OPINIONS BELOW

The United States District Court's Opinion granting the Respondent's Motion to Dismiss is not published. (Pet.'s App. B). The Eighth Circuit Court of Appeals' Opinion affirming in part and reversing in part the District Court's Opinion was published at 380 F.3d 1070 (Eighth Cir. 2004). (Pet.'s App. A).

STATEMENT OF JURISDICTION

Judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 23, 2004. Jurisdiction to consider this Opinion from the final judgment or decree by a case in the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

The statutes involved in this petition are Arkansas Code annotated § 16-4-101.B and Federal Rule of Civil Procedure 12(b)(2). The relevant portions of these statutes and rules are set out in Appendix C.

STATEMENT OF THE CASE

Robert Dever developed a meningitheliomatus meningioma of the brain as a result of his occupational exposure to CARC paint and other paint products as a civilian employee at the Fort Knox Army Base in Fort Knox,

Kentucky. CARC is a paint that is used largely on military vehicles which contains solvents and isocanate (HDI). Exposure to CARC paint may occur during indoor painting operations if proper personal protection equipment and engineering controls are not instituted. The ingredients of CARC have been attributed to the brain disease which currently afflicts Mr. Dever. As a result of his exposure to CARC, Mr. Dever suffered numbness to his right side and weakness in his arms and legs as well as other problems.

On May 7, 2003, Dever filed a complaint in the United States District Court, Western District for Arkansas, against the Respondents and other defendants alleging that they manufactured, sold, distributed, or otherwise placed into the stream of commerce, CARC and other paint products. Dever alleged that the CARC paint products were defective and the Respondents knew or should have known that Dever could have been exposed to dangerous and hazardous amounts of solvents contained in CARC paint products during the ordinary foreseeable use of their CARC paint products.

Dever asserted personal jurisdiction over each of the Respondents pursuant to Ark. Code Ann. § 16-4-101.B. The basis for personal jurisdiction arises out of the Respondents having:

1. transacted business in the state;

2. supplied their products in the state; and

3. derived substantial revenue from goods and manufactured products supplied in the state of Arkansas.

Dever asserted venue over the Respondents based upon 28 U.S.C. § 1391(a)(1) and (3) and (c) as each Respondent is subject to personal jurisdiction in the Western District of Arkansas.

The Respondents all moved to dismiss based upon lack of jurisdiction as well as improper venue. Dever defended Respondents' Motion to Dismiss on the basis that his complaint set forth a *prima facie* case of jurisdiction.

In response to the allegations contained in Dever's complaint, three of the respondents submitted affidavits of their corporate representatives. For example, Michael Cooley, Director of Legal and Regulatory Affairs for W. M. Barr & Company, stated that: "Barr has no offices, plants, inventory, real estate or bank accounts in Arkansas. Barr has no sales force or employees who work in Arkansas". (Petitioner's Appendix G). Mr. Cooley further stated: "There is Barr product that is sold on shelves in Arkansas. However, Barr sells its products from Memphis to various retailers and specialty industries who in turn sell them to consumers or use them in commercial applications."

M. Sherman Drew, Jr., Executive Vice President and General Counsel for NCP Coatings, Inc., stated: "NCP has no place of business in Arkansas; NCP is not registered as a foreign corporation doing business in Arkansas; and NCP has no offices, inventory, bank accounts, real estate, personal property, employees, or agents in Arkansas. (Petitioner's Appendix H.

Judith A. Albazi stated that Chase Products has no place of business in Arkansas; Chase Products is not registered as a foreign corporation to do business in Arkansas; and Chase Products Company has no offices, inventory, bank accounts,

real estate, personal property, employees or agents in Arkansas. (Petitioner's Appendix I).

Respondent, Hentzen Coatings, did not submit an affidavit in support of its Motion to Dismiss. Instead, Hentzen generally averred that it does not maintain a residence or place of business in the state of Arkansas, has no offices, inventory, bank accounts, real estate, personal property, employees or agents located in Arkansas. It further alleged it did not have a registered agent of service with the Arkansas Secretary of State's office. (Petitioner's Appendix D). No affidavit was submitted to support these conclusions.

The Respondents' affidavits and allegations were very carefully written so as not to misrepresent their position to the Court. None of them stated that they did not do business in Arkansas, sell their products in Arkansas, or derive substantial income from doing business there. None of their affidavits or pleadings refuted the actual allegations contained in Dever's complaint.

Dever requested the Court to allow him to conduct jurisdictional discovery to flush out facts relevant to the question. Whether or not the Respondents had bank accounts, property or service agents in Arkansas is not dispositive of the situation. It is all of their contacts that is relevant to make the determination as to whether or not the District Court could exercise jurisdiction over them.

The District Court granted the Respondents' Motions to Dismiss for lack of personal jurisdiction finding that Dever did not make a *prima facie* case of jurisdiction. In granting the Respondents' Motions to Dismiss, the District Court failed to address Dever's request to conduct discovery before deciding this issue.

Dever timely appealed the District Court's Opinion to the Eighth Circuit Court of Appeals. Dever again pointed out to the Court of Appeals the Respondents' carefully worded affidavits and their failure to allege facts that refuted the jurisdictional allegations contained in Dever's complaint. Dever also argued that the District Court abused its discretion by failing to provide him with jurisdictional discovery in light of the *prima facie* case of jurisdiction he established which was not refuted by the Respondents.

The Eighth Circuit Court of Appeals reversed the District Court's dismissal for lack of personal jurisdiction as it related to three parties. However, it affirmed the dismissal of Hentzen, Chase, NCP and W. M. Barr holding that Dever failed to establish a *prima facie* case of jurisdiction as it relates to the Respondents.

The Eighth Circuit also stated in a footnote that the District Court did not abuse its discretion by denying Dever the opportunity to conduct jurisdictional discovery citing to *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390 402 (4th Cir. 2003). This petition for writ of certiorari followed.

In this matter, the U.S. District Court for the Western District of Arkansas had jurisdiction under 28 U.S.C. § 1332. Likewise, the Eighth Circuit had jurisdiction over Dever's appeal pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The petition should be granted for the following reasons:

I. There is a conflict amongst the circuits regarding when a district court should grant a plaintiff the right to conduct

jurisdictional discovery to defend a motion to dismiss for lack of personal jurisdiction. The conflict results in a different outcome of the case depending on which circuit the lawsuit is filed. This Court should grant review to establish a uniform application of the Federal Civil Rules regarding jurisdictional discovery.

II. In 1995, the Arkansas Legislature affirmatively amended its long-arm statute so as to extend its jurisdictional arm over foreign defendants to the fullest extent authorized by the Due Process clause of the United States Constitution, consistent with *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) and *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). The decision of the Eighth Circuit, holding that Dever failed to establish a *prima facie* case of jurisdiction, takes a restrictive approach to personal jurisdiction. This Court should grant review to determine whether or not the Eighth Circuit's narrow view of personal jurisdiction undermines the Arkansas Legislature's intent to open its courts to litigants to the fullest extent of due process.

I. Certiorari is Warranted to Address the Conflicts Amongst the Circuits Regarding When Jurisdictional Discovery Should be Allowed to Decide Issues of Jurisdiction on a Complete Record.

There is a conflict amongst the circuits regarding when a plaintiff is entitled to obtain jurisdictional discovery to respond to a motion to dismiss for lack of personal jurisdiction. As a result of the conflict, the lower courts are rendering inconsistent opinions that significantly affect the outcome of a case depending on in which circuit it is filed. Dever requests certiorari so this Court can resolve this conflict and announce principles that can be uniformly applied

throughout the circuits just like it resolved in *Oppenheimer*[1] and *Catrett*[2] regarding which civil rules regulate the sending of notice in class action suits, and the summary judgment standard.

This Court has previously held that "[i]t is now clear that federal courts have the power to order, at their discretion, the discovery of facts necessary to ascertain their competency to entertain the merits." See *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978). "Where issues arise as to jurisdiction or venue, discovery is available to ascertain facts bearing on such issues." *Id.* at footnote 13. However as some of the Circuit Courts have recognized, "[t]he problem is the degree to which such discovery is mandatory or discretionary." See *Eaton v. Dorchester Development, Inc.,* 692 F.2d 727, 729 (11th Cir. 1982). Jurisdictional discovery should not entirely be discretionary. *Id.* at 733. However, this Court has never expressed an opinion as to when jurisdictional discovery should be allowed, or its extent.

The Circuit Courts are not in agreement regarding whether or not a district court should grant jurisdictional discovery, and under what circumstances. For example, the Third Circuit has acknowledged that:

> [n]umerous cases have sustained the right of plaintiffs to conduct discovery before the district court dismisses for lack of personal jurisdiction. *Edmond v. United States Postal Serv. Gen Counsel*, 292 U.S. App. D.C., 949 F.2d 415, 425 (D.C. Cir. 1991) ("As a

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[1] *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340 (1978)

[2] *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986)

> general matter discovery under the Federal Rules of Civil Procedure should be freely permitted, and this is no less true when discovery is directed to personal jurisdiction."); *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982) ("When a defendant challenges personal jurisdiction, courts generally permit depositions confined to the issues raised in the motion to dismiss. In an appropriate case, we will not hesitate to reverse a dismissal for lack of personal jurisdiction, on the grounds that the plaintiff was improperly denied discovery."); *Fraley v. Chesapeake & Ohio Ry. Co.*, 397 F.2d 1, 3 (3d Cir. 1968) (holding that district court erred in refusing to direct defendant to answer interrogatories designed to elicit responses relevant to whether personal jurisdiction could be exercised over defendant).

Renner v. Lanard Toys Limited, 33 F.3d 277, 283 (3d Cir. 1994). Thus, *Renner* held that the district court should have deferred ruling on the motion and given the plaintiffs time to conduct jurisdictional discovery. *Id.*[3]

In *Surpitski v. Hughes-Keenan Corporation*, 362 F.2d 245 (1st Cir. 1966), the First Circuit stated:

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[3] See also *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (holding courts are to assist the plaintiff by allowing jurisdictional discovery); *Compagnie Des Bauxites De Guinee, v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983) (holding that discovery must be broad enough to allow the plaintiff enough opportunity to elicit facts regarding the "doing business" and the "minimum contacts" requirements of due process).

> A plaintiff who is a total stranger to a corporation should not be required unless he has been undiligent, to try such an issue on affidavits without the benefit of full discovery. If the court did not choose to hear witnesses, this may well have been within its province, but in such event plaintiff was certainly entitled to file such further interrogatories as were reasonably necessary and, if he wished, to take depositions. The condemnation of plaintiff's proposed further activities as a fishing expedition is whether it is in the pond, we know no reason to deny, a plaintiff the customary license.

Id. at 255-56.

The Ninth Circuit has held that "[d]iscovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 540 (9th Cir. 1986). See also *Wells Fargo & Co. V. Wells Fargo Express Co.*, 556 F.2d 406, 431 n. 24 (9th Cir. 1977).

The Eleventh Circuit has also held that reasonable discovery for purposes of demonstrating that jurisdiction does exist should be allowed, and that failure to permit such discovery would be treated as reversible error. *Majd-Pour v. Georgiana Comm. Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984).[4]

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[4] See also *Davis v. Asano Bussan Company*, 212 F.2d 558 (5th Cir.1954), (the plaintiff was entitled to discover facts related to jurisdiction); *Blanco v. Carigulf Lines*, 632 F.2d 656 (5th Circuit 1980), (plaintiff is entitled to elicit material through discovery

In contrast, other jurisdictions have placed specific limitations on when jurisdictional discovery should be allowed. The Fourth Circuit's policy is that "when a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery." *Carefirst v. Carefirst, supra*, at 402-403. Likewise, the D.C. Circuit has recognized that to justify jurisdictional discovery, the plaintiff must allege specific facts rather than general statements. *Edmond v. United States Postal Service General Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991). The D.C. Circuit has also stated that a plaintiff must have a "good faith belief" that jurisdictional discovery will allow the plaintiff to show the court that it has jurisdiction over the defendant. *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090 (D.C. App. 1998). Through its published opinion in this case, the Eighth Circuit has joined the Fourth Circuit in denying jurisdictional discovery.[5]

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before a claim would be dismissed for lack of jurisdiction); *Williamson v. Tucker,* 645 F.2d 404, 414 (5th Cir. 1981) (When jurisdictional facts are in dispute "the district court must give the plaintiff an opportunity for discovery or a hearing that is appropriate to the nature of the Motion to Dismiss").

[5] The Eighth Circuit's holding in this case conflicts with its previous decisions where it noted that the trial courts will typically grant a plaintiff reasonably discovery on the personal jurisdictional issue so that a motion to dismiss for lack of personal jurisdiction can be decided on a full record. *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1113 (8th Cir. 1999). The conflict is one that exists not merely between the circuits, but on a case by case basis within each individual circuit.

While all of the Circuits agree that it is within the District Court's discretion whether or not to grant jurisdictional discovery, there is a conflict as to what constitutes an abuse of discretion, as some circuits allow the discovery more freely than others. As a result of the conflict, the same case will yield a substantially different result depending on where it is filed. The Eighth Circuit and the Fourth Circuit clearly do not allow jurisdictional discovery on a record such as one that exists in this case. The ultimate result is that the case is dismissed. However, had Dever filed in the Third Circuit, he would have received discovery pertaining to jurisdiction, which would have given him a better opportunity to establish jurisdiction. The lack of uniformity regarding this key procedural issue is troubling. The litigant should be able to reasonably expect the same result no matter in which court he files his suit. The conflict within the circuits does not reasonably guarantee consistent decisions.

The benefits of the Court establishing uniform rules for granting jurisdictional discovery is threefold. First, it would remove the risk of arbitrary decisions by the lower federal courts. Second, it should result in a much more efficient process that will benefit all litigants and courts, much like this Court's decision in *Catrett*, which clarified the summary judgment standard. Third, the Court can ensure a uniform result no matter where the case is filed.

The record in this case and the issues presented make it desirable to resolve the conflict amongst the circuits. Dever's Complaint set forth a *prima facie* case of jurisdiction. The Respondents submitted affidavits in support of their motions to dismiss, none of which addressed the jurisdictional allegations in his complaint. Dever requested discovery on the jurisdictional issue. In support of his request, he submitted an affidavit of his counsel stating that discovery was

necessary to explore the bases for the statements contained in the Respondents' affidavits. (Petitioner's Appendix J). Unfortunately, he was not given the opportunity, and his case was dismissed on the basis of the Respondent's allegations that they did not have bank accounts, real estate or personal property located in Arkansas. Despite not resolving the conflict, the District Court did not grant jurisdictional discovery and the Eighth Circuit held it did not abuse its discretion in denying discovery.

Accordingly, this Court should grant certiorari to resolve the conflicts amongst the circuits regarding when jurisdictional discovery is permitted.

II. Writ of Certiorari Should Issue to Determine Whether the Eighth Circuit Undermined Arkansas' Policy of Open Access to Its Courts by Failing to Exercise Jurisdiction.

In *Ferens v. John Deere, supra*, this Court established several important principles related to a state's right to restrict or expand access to its courts. With full knowledge of the Court's decision in *Ferens*, the Arkansas Legislature made an affirmative decision to give plaintiffs the full range of due process and to enjoy unfettered access to their courts. Ark. Code Ann. §16-4-101.B.[6] This Court should grant review to address whether the Eighth Circuit undermined the Arkansas Legislature's affirmative decision to open access to its courts

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[6] The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution.

by failing to find jurisdiction, or at a minimum, grant Dever jurisdictional discovery.

Under *Ferens,* the state Legislatures are authorized to expand or restrict access to their courts. In its aftermath some states have closed the doors to their courts by enacting shorter statutes of limitations and borrowing statutes, or by amending their long-arm statutes to eliminate the exercise of personal jurisdiction over non-resident defendants where the cause of action does not arise out of defendant's contacts with that state.

However, with full knowledge of *Ferens,* the Arkansas Legislature made an affirmative decision to open access to courts by removing barriers to obtaining personal jurisdiction. *Davis v. St. John's Health System,* Ark., 71 S.W.3d 55, 61 (2002). In 1995, Arkansas amended its long-arm statute. Prior to then, courts in Arkansas could not exercise personal jurisdiction over a non-resident defendants doing business in the state unless the cause of action arose out of its doing business. *Id.* The 1995 amendment eliminated that requirement. In *Davis*, the Arkansas Supreme Court noted that the 1995 amendment to Arkansas' long-arm statute, "**expanded the jurisdiction of Arkansas courts over nonresident defendants significantly** . . ." *Id.*

In finding jurisdiction to be lacking, the district court and Eighth Circuit took a narrow view of the extent of Arkansas' jurisdictional arm in contradiction to the Arkansas Legislature's policy of open access. It stated "[w]e do not think that the mere allegations of the complaint, when contradicted by affidavits, are enough to confer personal jurisdiction of a nonresident defendant." (Appendix A at p. 5) (citing *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967)). Thus, they accepted the Respondents'

affidavits, submitted in support of their motions to dismiss, despite that they were carefully crafted and did not respond to the jurisdictional allegations in Dever's Complaint. The Eighth Circuit apparently believes that any statement in an affidavit by a defendant is sufficient to refute the jurisdictional allegations of a complaint. However, the Seventh Circuit has held that when considering a motion to dismiss for lack of personal jurisdiction, a district court "must accept all **undenied** allegations and all factual conflicts are to be resolved in a light most favorable to the Plaintiff." *Saylor v. Dyniewski*, 836 F.2d 341, 342 (7th Cir. 1988).

In the abstract, many defendants can make claims similar to those made by the Respondents to defeat jurisdiction. The Big Three car manufacturers, Ford, Chrysler and General Motors, may not have bank accounts, personal property, real property, or agents in Arkansas but their cars are sold in Arkansas, and they derive substantial economic benefit from selling there. General Electric may not have plants, offices or employees in Arkansas, but every Arkansas hardware store sells its lightbulbs.

Dever alleged the following jurisdictional facts in his Complaint, which the Respondents' affidavits did not refute, or address:

1. They transacted business in the State of Arkansas;

2. They sold goods in Arkansas;

3. They derived substantial economic benefit from selling goods or services in Arkansas; and/or

4. They directed activities toward Arkansas, and purposefully availed themselves of its benefits.

Faced with these unrefuted facts, the lower courts only had two viable options, either deny the motions to dismiss, or grant discovery on the jurisdictional issue. *Watlow Elec. Mfg. v. Patch Rubber Co.*, 838 F.2d 999 (8th Cir. 1988) (holding "if the District Court does not hold a hearing and instead relies on pleadings and affidavits..., the court must look at the facts in a light most favorable to the non-moving party, and **resolve all factual conflicts in favor of that party**").

Accordingly, Certiorari is warranted to address whether the District Court and Eighth Circuit undermined the Arkansas' Legislature's intent to afford litigants the full range of due process by failing to exercise jurisdiction or, at a minimum, afford Dever the opportunity to conduct jurisdictional discovery.

CONCLUSION

For the foregoing reasons, Petitioner, Robert Dever, requests this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit to resolve the significant conflict amongst the circuits regarding whether or not and under what circumstances district courts should grant discovery relevant to personal jurisdiction prior to deciding a motion to dismiss for lack of personal jurisdiction. Furthermore, the Eighth Circuit's opinion should be reviewed to address whether Arkansas' expansive view of jurisdiction was undermined by the Eighth Circuit's dismissal of Dever's case for lack of personal jurisdiction where the Respondent's affidavits and pleadings did not refute the jurisdictional allegations in his Complaint, and where he did not obtain jurisdictional discovery.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3695

[Filed August 23, 2004]

Robert L. Dever,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Hentzen Coatings, Inc.;	)
Sherwin Williams Company;	)
W.M. Barr & Company;	)
LHB Industries., Inc.;	)
Hill Manufacturing Company, Inc.;	)
Niles Chemical Paint Company, Inc.;	)
and Chase Products Company;	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Western District of Arkansas

Before MORRIS SHEPPARD ARNOLD, McMILLIAN, and MELLOY, Circuit Judges.

OPINION

MELLOY, Circuit Judge.

Robert Dever ("Dever") claims that he developed a brain tumor as the result of his exposure to chemical products produced by Hentzen Coatings, Inc. ("Hentzen"), Sherwin Williams Company ("Sherwin Williams"), W.M. Barr & Company ("W.M. Barr"), LHB Industries, Inc. ("LHB"), Hill Manufacturing Company, Inc. ("Hill"), Niles Chemical Paint Company, Inc. ("Niles"), and Chase Products Company ("Chase Products"). The district court granted defendants' motions to dismiss for lack of personal jurisdiction. We affirm in part, reverse in part, and remand for further proceedings.

I.

Dever, a resident and citizen of Kentucky, worked as a civilian employee at the Fort Knox Army Base in Fort Knox, Kentucky. He claims that he developed a brain tumor as a result of his occupational exposure to chemical agent resistant coating ("CARC") paint products. After the one-year statute of limitations ran in Kentucky, Dever brought this tort action in the United States District Court for the Western District of Arkansas. Dever alleged that defendants manufactured, sold, or distributed the CARC products to which he was exposed in Kentucky. None of the defendants are incorporated or have principal places of business in Arkansas.

II.

We review personal jurisdiction questions de novo. *Burlington Indus., Inc. v. Maples Indus., Inc.*, 97 F.3d 1100, 1102 (8th Cir. 1996). To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff "must state sufficient facts

in the complaint to support a reasonable inference that [the defendants] can be subjected to jurisdiction within the state. Once jurisdiction ha[s] been controverted or denied, [the plaintiff] ha[s] the burden of proving such facts." *Block Indus. v. DHJ Indus., Inc.*, 495 F.2d 256, 259 (8th Cir. 1974) (internal citation omitted). The plaintiff's "'prima facie showing' must be tested, not by the pleadings alone, but by the affidavits and exhibits presented with the motions and in opposition thereto." *Id.* at 260. *See also Davis v. St. Johns Health Sys., Inc.*, 348 Ark. 17, 71 S.W.3d 55, 57 (Ark. 2002) ("If the complaint does not allege sufficient facts on which personal jurisdiction can rest, then the complaint is factually deficient. Mere conclusory statements devoid of a factual foundation do not suffice in this inquiry.") (internal citation omitted); *Jet Charter Serv., Inc. v. W. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1990) ("When a defendant raises through affidavits, documents or testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents."); *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967) ("We do not think that the mere allegations of the complaint, when contradicted by affidavits, are enough to confer personal jurisdiction of a nonresident defendant. In such a case, facts, not mere allegations, must be the touchstone.").

"A federal court in a diversity action may assume jurisdiction over nonresident defendants only to the extent permitted by the long-arm statute of the forum state and by the Due Process Clause." *Morris v. Barkbuster, Inc.*, 923 F.2d 1277, 1280 (8th Cir. 1991). Because the long-arm statute of Arkansas confers jurisdiction to the fullest constitutional extent, *see Davis*, 71 S.W.3d at 58, our inquiry is limited to whether the exercise of personal jurisdiction comports with

due process. *Id. See also Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 818 (8th Cir. 1994).

"Due process requires 'minimum contacts' between [a] non-resident defendant and the forum state such that 'maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Burlington Indus.*, 97 F.3d at 1102 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). The Supreme Court has set forth two theories for evaluating minimum contacts, general jurisdiction and specific jurisdiction. Under the theory of general jurisdiction, a court may hear a lawsuit against a defendant who has "continuous and systematic" contacts with the forum state, even if the injuries at issue in the lawsuit did not arise out of the defendant's activities directed at the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). In contrast, specific jurisdiction is viable only if the injury giving rise to the lawsuit occurred within or had some connection to the forum state. *Id.* at 414. *See also Bell Paper Box*, 22 F.3d at 819 (identifying two types of personal jurisdiction—specific jurisdiction and general jurisdiction—and noting that the former "refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state," while the latter "refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose").

Both theories of personal jurisdiction require "some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). If a court determines that a defendant has minimum contacts

with the forum state, it may then consider "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

Based on the foregoing, we have instructed courts to consider the following factors when resolving a personal jurisdiction inquiry: "(1) the nature and quality of [a defendant's] contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) [the] convenience of the parties." *Burlington Indus.*, 97 F.3d at 1102. Significant weight is given to the first three factors. *See id.* ("[T]he first three factors [are] of primary importance."). However, the fact that the cause of action is not linked to the defendant's contacts with the forum state does not necessarily preclude a finding of personal jurisdiction. *See Helicopteros*, 466 U.S. at 414-15 (explaining general personal jurisdiction).

III.

Dever does not argue that the district court had the power to exercise specific personal jurisdiction. We agree with the district court that no basis for specific personal jurisdiction exists, as the alleged injury arose outside of Arkansas. The issue is whether there is a basis for the district court to exercise general personal jurisdiction over the defendants.

- Chase Products, Niles, & Hentzen

Chase Products, Niles, and Hentzen are incorporated and have principal places of business outside of Arkansas. Each of

these defendants challenged the exercise of personal jurisdiction below. Chase Products and Niles averred that they are not registered to do business in Arkansas and have no offices, inventory, bank accounts, real estate, personal property, employees, or agents in the state. Niles further alleged that its products are sold to three military depots only, none of which are located in Arkansas. In its motion to dismiss, Hentzen generally averred that it lacked sufficient contacts with Arkansas to establish personal jurisdiction. On appeal, Hentzen admits that it transacts business in Arkansas but maintains that its business transactions there are *de minimis*.

After defendants challenged the exercise of personal jurisdiction, Dever failed to rebut their assertions with testimony, affidavits, or other documents. Instead, he rested on the conclusory allegations in his complaint to establish minimum contacts. Where the assertions in a plaintiff's complaint are contested, this is not enough. *See Block Indus.*, 495 F.2d at 260; *Jet Charter Serv.*, 907 F.2d at 1112; and *Taylor*, 383 F.2d at 639. Because Dever failed to make a prima facie showing that these defendants had "continuous and systematic" contacts with the forum state, the district court had no basis to exercise general personal jurisdiction over them. *Helicopteros*, 466 U.S. at 416.[1]

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[1] We reject Dever's argument that the district court abused its discretion in denying him the opportunity to conduct jurisdictional discovery. *See Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) ("When a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery.").

- W.M. Barr

W.M. Barr is incorporated and has its principal place of business in Tennessee. W.M. Barr manufactures chemicals, but it is undisputed that W.M. Barr does not manufacture, distribute, or sell CARC products. In its motion to dismiss, Barr averred that it is not registered to do business in Arkansas and that it has no offices, inventory, real estate, employees, bank accounts, personal property, or agents in the state. Unlike Chase Products and Niles, W.M. Barr conceded that its products are sold in Arkansas. However, W.M. Barr maintained, and Dever did not dispute, that W.M. Barr "sells its product[s] from Memphis[, Tennessee] to various retailers and specialty industries who in turn sell them to consumers or use them in commercial applications."

Dever argues that the district court had the power to exercise general personal jurisdiction over W.M. Barr because W.M. Barr placed its products in the stream of commerce. We disagree. The mere fact that W.M. Barr's non-CARC products are found in Arkansas is insufficient to support a finding of general personal jurisdiction under a stream-of-commerce theory. *See Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir.1990) ("[P]lacement of a product into the stream of commerce, without more, does not constitute an act of the defendant purposefully directed toward the forum State."); *Guinness Import Co. v. Mark VII Distribs., Inc.*, 153 F.3d 607, 614-15 (8th Cir. 1998) (finding that a Jamaican brewer, whose beer was distributed in Minnesota, did not have sufficient minimum contacts with Minnesota for the exercise of personal jurisdiction; the plaintiff failed to show that the brewer exercised control over distributors once beer left the foreign country; plaintiff further failed to show that the brewer was licensed to do business in the state, had employees or agents

in the state, or maintained bank accounts, phone numbers, or mailing addresses in the state). Moreover, nothing in the record suggests that W.M. Barr "'pour[ed] its products' into a regional distributor with the expectation that the distributor [would] penetrate [the Arkansas market]." *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) (quoting *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994). We therefore find that Dever failed to generate a prima facie showing of personal jurisdiction with regard to W.M. Barr.

- Sherwin Williams

Sherwin Williams is incorporated and has its principal place of business in Cleveland, Ohio. Sherwin Williams admitted that it operates retail stores in Arkansas and has a registered agent for service of process there. Sherwin Williams further admitted it sells CARC products to the military; however, Sherwin Williams maintained that it sells only residential products (not CARC products) to the public in its retail stores.

We find that Sherwin Williams has sufficient contacts with the state of Arkansas to meet the requirements of the Due Process Clause. Although the parties do not reside in Arkansas and Dever's alleged injury took place in Kentucky, the fact remains that Sherwin Williams conducts continuous business in Arkansas; it employs workers, owns and leases property, and has designated an agent for service of process in the state. Sherwin Williams "purposefully avail[ed] itself of the privilege of conducting activities within the forum state," *Hanson v. Denckla*, 357 U.S. at 253, and its contacts were not "random, fortuitous, or attenuated." *Burger King*, 471 U.S. at 475 (internal quotations omitted). Giving due weight to the nature, quality, and quantity of its connections,

we find that Sherwin Williams could "reasonably anticipate being haled into court" in Arkansas. *World-Wide Volkswagen*, 444 U.S. at 297. *See Davis*, 71 S.W.3d at 61 (finding that although the parties resided outside the forum state and the alleged injury took place outside the forum state, minimum contacts were met because defendant conducted substantial business in the forum state, had substantial property and employees in the forum state, and designated an agent for service of process there).

- LHB & Hill

LHB and Hill did not file motions to dismiss for lack of personal jurisdiction. Instead, they filed motions for summary judgment on the merits of Dever's tort claim, alleging that they never manufactured, distributed, or sold CARC products. The district court dismissed all defendants on personal jurisdiction grounds and did not rule on these defendants' motions for summary judgment. On appeal, LHB and Hill now contend that they have insufficient contacts with Arkansas to establish personal jurisdiction. However, neither has denied that they transacted business or derived substantial economic benefit in Arkansas.

At this stage of the litigation we are compelled to accept uncontested allegations as true and to view them in the light most favorable to Dever. *See Vandelune*, 148 F.3d at 948. Doing so, we assume that the quantity, quality, and nature of these defendants' contacts with Arkansas are significant and find that Dever made a prima facie showing of general personal jurisdiction. *See Burger King*, 471 U.S. 462 at 475, 85 L. Ed. 2d 528 ("[W]here the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of

conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well."). Although a more fully developed record may ultimately reveal that minimum contacts are lacking, at this point, we cannot say there is no basis to exercise personal jurisdiction over these defendants.[2]

Based on the foregoing, we affirm the district court's finding that it lacked personal jurisdiction over Chase Products, Niles, Hentzen, and W.M. Barr. We reverse the district court's finding that it lacked personal jurisdiction over

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[2] LHB and Hill denied Dever's assertion that they manufactured, distributed, or sold CARC products. While this may be dispositive in a motion for summary judgment on the merits of Dever's tort claim, it does not necessarily preclude a finding of general personal jurisdiction. As noted above, a court may hear a lawsuit against a defendant who has "continuous and systematic" contacts with the forum state, even if the injuries at issue in the lawsuit did not arise out of the defendant's activities directed at the forum. *Helicopteros*, 466 U.S. at 416.

LHB, Hill, and Sherwin Williams and remand for further proceedings.[3]

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[3] The district court denied Dever's motion to amend his original complaint, finding that it added "nothing more to the jurisdictional equation." Because we reverse the district court's finding that it lacked personal jurisdiction over LHB, Hill, and Sherwin Williams, we also vacate the district court's order denying Dever's motion to amend. Upon remand, the district court should reconsider whether to grant Dever leave to amend his original complaint. We express no opinion as to whether such leave should be granted. We also express no opinion as to whether venue is proper in the Western District of Arkansas, an issue raised by the parties below.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

Civil No. 03-5088

[Filed October 6, 2003]

ROBERT L. DEVER	)
Plaintiff	)
	)
v.	)
	)
HENTZEN COATINGS, INC., et al.	)
Defendant	)
	)

JUDGMENT

NOW on this 3 day of October 2003, comes on for consideration defendants' Motions to Dismiss (documents #6, 8, 13, 17, 35) and Motions for Summary Judgment (documents #27, 30, 38) the various responses and replies thereto, and plaintiff's Motion to Amend Complaint (document #49), and the Court, being well and sufficiently advised, finds and orders as follows:

1. Plaintiff, Robert Dever, a resident and citizen of Kentucky, filed this action on May 7, 2003, naming as

defendants Hentzen Coatings, Inc., The Sherwin-Williams Company, W.M. Barr & Company, LHB Industries, Inc., Hill Manufacturing Company, Inc., Niles Chemical Paint Company, Inc., and Chase Products Company. Plaintiff alleges that as a result of exposure to chemical agent resistant coating ("CARC") paint products[1] while employed at the Fort Knox Army Base in Kentucky between 1993 and 2000, he has developed meningiotheliomatus meningioma, otherwise known as a brain tumor. Plaintiff alleges in his complaint that one or more of the defendants manufactured, sold, and/or distributed the allegedly toxic CARC products to which he was exposed at Fort Knox. Plaintiff's complaint includes claims for negligence, strict liability and breach of warranty.

2. Defendants filed motions to dismiss, alleging that this Court lacks personal jurisdiction over them. Defendants contend they have insufficient contacts with Arkansas to satisfy maintenance of this action in Arkansas and allege that plaintiff is simply forum shopping as the one (1) year statute of limitations has expired in his resident state of Kentucky. *See* Ken. Stat. §413.130. As one or more of the defendants' motions attached matters outside the pleadings for the Court's consideration, the Court elected to treat the motions as ones for summary judgment and provided the parties additional time to make submissions. *See* F.R.Civ.P. 12(b); ***but see*** ***Casazza v. Kiser,*** 313 F.3d. 414, 418 (8th Cir. 2002)(matters outside the pleadings may be considered without conversion of the motion to one for summary judgment); ***Deuser v.***

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[1] The Court understands that CARC to be a unique military product which is not available to the general public. CARC products are subject to specific regulations promulgated by the United States Army Research Laboratory ("ARL") on behalf of the Department of Defense.

Vecera, 139 F.3d 1190, 1191 n. 3 (8th Cir. 1998) ("The district court has the authority to consider matters outside the pleadings on a motion challenging subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)."). Several of the defendants thereafter filed motions for summary judgment; all defendants seek dismissal.

3. As the parties are aware, "[w]hen personal jurisdiction is challenged, plaintiff has the burden to show that jurisdiction exists" *Burlington Industries Inc. v. Maples Industries,* 97 F.3d 1100, 1102 (8th Cir. 1996) (citation omitted.). "[T]he burden does not shift to the party challenging jurisdiction." *Gould v. P.T. Krakatau Steel,* 957 F.2d 573, 575 (8th Cir.), *cert. denied* 506 U.S. 908 (1992), citing *Newhard, Cook & Co. v. Inspired Life Centers, Inc.,* 895 F.2d 1226, 1228 (8th Cir. 1990). Thus, plaintiff bears the burden of making a prima facie showing of this Court's jurisdiction over defendants. *See First National Bank of Lewisville, Arkansas v. First National Bank of Clinton, Kentucky,* 258 F.3d 727, 729 (8th Cir. 2001); *Falkirk Min. Co. v. Japan Steel Works, Ltd.,* 906 F.2d 369, 373 (8th Cir. 1990).

Under governing precedent, "[d]etermining whether jurisdiction exists over an out-of-state defendant involves two inquiries: (I) whether a forum's long-arm statute permits the assertion of jurisdiction, and (2) whether assertion of personal jurisdiction violates federal due process." *Graphics Controls Corp. v. Utah Med. Prods., Inc.,* 149 F.3d 1382, 1385 (Fed. Cir. 1998) (footnote omitted). Because Arkansas' long-arm statute permits the assertion of jurisdiction to the extent permitted by the Due Process Clause, Ark. Code Ann. § 16-4-1001(B) (Supp. 1995); *see also Kilcrease v. Butler*, 293 Ark. 454, 455, 739 S.W.2d 139 (1987), the sole inquiry is whether the exercise of personal jurisdiction is consistent with

the due process clause[2]. *See 3D Systems,* 160 F.3d at 1377; *see also Epps v. Stewart Information Services Corp.,* 327 F.3d 642, 647 (8th Cir. 2003).

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-72 (1985) (quotation omitted). Due process requires sufficient "minimum contacts" between the defendant and the forum state so that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291-92 (1980).

To satisfy his burden, plaintiff must establish either specific jurisdiction or general jurisdiction. *Merck & Co., Inc. v. Barr Lab., Inc.,* 179 F.Supp.2d 368, 371 (D.Del. 2002); *Mason v. Mooney Aircraft Corp.,* 2003 WL 21244160 (W.D. Missouri) (Slip Opinion) (May 8, 2003) (explaining differences in two concepts). Specific jurisdiction arises when the particular cause of action arose from the defendant's activities within the forum state; general jurisdiction arises when the defendant has continuous and systematic contacts with the state, irrespective of whether defendant's connections are related to the particular cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984); *see also Viam Corp. v. Iowa Export-Import Trading Co.,* 84 F. 3d 424, 427 (Fed. Cir. 1996) (specific jurisdiction distinguished from general jurisdiction; general jurisdiction

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[2] Courts are to apply the "minimum contacts" standard developed in *International Shoe* and its progeny. *Hilderbrand v. Steck Mfg. Co., Inc.,* 279 F.Supp.2d 1351, 1355 (Fed. Cir. Feb. 7, 2002).

where defendant's contacts at issue have no necessary relationship to the cause of action).

(a) Specific Personal Jurisdiction -- Plaintiff has not asserted, and the Court finds no basis for, the exercise of specific personal jurisdiction. It is undisputed that the allegedly toxic tort occurred at Fort Knox, Kentucky where plaintiff allegedly encountered CARC products during the course and scope of his employment at Fort Knox between 1993-2000. There is no allegation that any tortious activities forming the basis of plaintiff's claims occurred in Arkansas. Furthermore, all parties are foreign to this jurisdiction: Plaintiff was not then, nor is he now, a citizen and resident of the State of Arkansas and none of the defendants are incorporated or have their principal place of business in Arkansas.

(b) General Personal Jurisdiction -- The real question, then, is whether this Court's exercise of general personal jurisdiction over defendants in Arkansas would comport with due process. Due process focuses on the fundamental fairness of exercising jurisdiction over a nonresident defendant, and therefore, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

The United States Supreme Court has held that to maintain general jurisdiction over a foreign defendant, the facts must establish "substantial" or "continuous and systematic general business contacts" with the forum state. *Helicopteros,* 466 U.S. at 416. Such affiliations are construed in light of the Due Process Clause which permits the Court to exercise jurisdiction only if doing so would not "offend traditional

notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). That is, a defendant must "reasonably anticipate being haled into court" in the remote forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980.) While lack of physical presence in a state cannot alone defeat jurisdiction, "random," "fortuitous," or "attenuated" contacts do not count in the minimum contacts calculus. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985). If a party is amenable to general jurisdiction, then it can be said that it has such numerous contacts with the forum that it may be haled into court in that forum even for a suit not arising out of its forum contacts. *See Helicopteros,* 466 U.S. at 416.

By the same token, a showing of contacts alone is not enough; a foreign defendant may still defeat jurisdiction by marshalling a compelling case that its exercise would be unreasonable or contrary to concepts of fair play and substantial justice. *Viam Corp.*, 84 F.3d at 429. "The test of unreasonableness is a multi-factored balancing test that weighs any burdens on the defendant, against various countervailing considerations, including the plaintiff's interest in a convenient forum and the forum state's interest in resolving conflicts flowing from in-state events." *Id.*, citing *Burger King Corp. v. Rudzewicz,* 471 U.S. at 477. For these reasons, a "plaintiff must show significantly more than mere minimum contacts to establish general jurisdiction." *Molnlycke Health Care AB v. Dumex Medical Surgical Prod., Ltd.,* 64 F.Supp.2d 448, 450 (E.D. Pa. 1999).

Thus, once defendants' contacts with the forum have been established, the Court considers the following factors in deciding whether to exercise jurisdiction:

(1) the nature and quality of defendants' contacts with the forum state;

(2) the quantity of such contacts;

(3) the relation of the cause of action to the contacts;

(4) the interest of the forum state in providing a forum for its residents; and

(5) the convenience of the parties.

Epps, 327 F.3d at 648, citing *Burlington Industries, Inc. v. Maple Industries, Inc.,* 97 F.3d 1100, 1102 (8th Cir. 1996) (addt'l citations omitted). In applying these factors, the central inquiry is the "relationship among the defendant, the forum and the litigation." *Land-O-Nod Co. v. Bassett Furniture, Inc.,* 708 F.2d 1338, 1340 (8th Cir 1983) (quoting *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977)).

Finally, even where a jurisdictional threshold can be established, "personal jurisdiction may be defeated if its exercise would be unreasonable" and in making this determination, the Court considers factors such as

(a) the burden on the defendant; (b) the interest of the forum state; (c) the plaintiff's interest in obtaining relief; (d) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (e) the shared interest of the several states in furthering fundamental substantive social policy.

Asahi, 480 U.S. at 113-14; *Falkirk Mining Co. v. Japan Steel Works, Ltd.,* 906 F.2d 369, 374 (8th Cir. 1990).

4. With these considerations of due process in mind, the Court turns to an examination of defendants' contacts with Arkansas and makes the following observations in connection therewith:

* The nature and quality of the defendants' contacts with Arkansas, the quantity of defendants' contacts, and the relationship of plaintiff's cause of action to the defendants' contacts all weigh against this Court's exercise of jurisdiction. The undisputed averments are (a) that no named defendant is a resident of Arkansas; and (b) that no defendant maintains a business presence in Arkansas which is related to plaintiff's cause of action, i.e., exposure to toxic paint products produced pursuant to government specifications and sold for use by the United States' military.

For example, defendant Sherwin Williams is incorporated in Ohio with its principal place of business in Cleveland, Ohio. While there may be little doubt that Sherwin Williams has a business presence in many states including Arkansas, Sherwin Williams' uncontested assertion is that CARC paints are unique products which are sold to the military but not to the general public at any of its retail stores. Thus, Sherwin Williams' contacts with the State of Arkansas are completely unrelated to plaintiff's cause of action. While the Court notes that Sherwin Williams has a registered agent for service of process here, Arkansas law is clear that a registered agent "hardly amounts to 'the general business presence' of a corporation so as to sustain an assertion of general jurisdiction." *Davis v. St. Johns Health System, Inc.*, 348 Ark. 17, 24-26 (2002); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992); *but see Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990).

Defendant W.M. Barr & Company, Inc., is a Tennessee corporation with its principal place of business in Memphis, Tennessee. It is undisputed that Barr has no offices or properties located in Arkansas and is not registered to conduct business within the State. *See* Affidavit of Michael S. Cooley. Barr further avers that, to the best of its knowledge, it is not a manufacturer, distributor or seller of any chemical agent resistant coating (CARC) paint products. While Barr's non-CARC products may be found within Arkansas' stream of commerce, it is further undisputed that third parties -- and not Barr -- distribute those products in Arkansas. *See* Affidavit of Michael S. Cooley, Barr's Director of Legal and Regulatory Affairs.

Defendant Hentzen Coatings, Inc., is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. It is unchallenged that Hentzen is not registered to conduct business on Arkansas and has no offices, inventory, bank accounts, real estate, personal property, employees or agents in Arkansas. The Court notes that even if Hentzen produces CARC products for the military, there is no indication whatsoever that Hentzen's products were ever sold or distributed to the general public in Arkansas or that plaintiff ever encountered Hentzen's products in Arkansas.

Defendant Chase Products Company is an Illinois corporation with its principal place of business in Broadview, Illinois. It is uncontested that Chase is not registered to conduct business on Arkansas and has no offices, inventory, bank accounts, real estate, personal property, employees or agents in Arkansas. Chase further alleges that it

> sells only aerosol spray paints, which come in small cans, and does not sell chemical agent resisting coating

("CARC") paints. Defendant Chase has never made or sold CARC paints.

Chase does not have, and has never had, the ability to make CARC paints, which are applied with a spray gun from bulk containers, not with aerosol cans. Defendant Chase does not now, nor has it ever, had the ability to make the two-part epoxy catalyst system required of CARC paints.

See Chase's Statement of Undisputed Facts; *see also* Affidavit of Judith A. Albazi, Chase's Vice President of Operations.

Defendant Niles Chemical Paint Company, which apparently changed its name to "NCP Coatings Inc." in January 2001, is an Indiana corporation with its principal place of business on Niles, Michigan. NCP similarly alleges it

. . . . has been a manufacturer of chemical agent resistant coating paint products specially made for the United States military according to government specification and pursuant to contract with the General Services Administration (GSA). These products were sold only to U.S. military suppliers and did not enter the consumer marketplace.

The only locations where these paint products were sent pursuant to GSA contract were three military depots located in Stockton, California; Burlington, New Jersey; and Albany, Georgia.

Under the government contracts pursuant to which these products were supplied to the U.S. military,

> NCP had no expectations or knowledge as to where these products would ultimately be located or used.

See Niles' Statement of Undisputed Facts; *see also* Affidavit of M. Sherman Drew, Jr., NCP's Executive Vice President. NCP further contends that it has no place of business in Arkansas; is not registered to do business in Arkansas; and has no offices, inventory, bank accounts, real estate, personal property, employees or agents in Arkansas. *See* Affidavit of M. Sherman Drew, Jr.

Defendant LHB Industries, Inc. is a Missouri corporation with its principal place of business in St. Louis, Missouri. LHB contends that it "has never produced, sold, delivered or shipped any CARC paint" or "any urethane-based products at all" and that it is not listed by the U.S. Army Research Laboratory "as a qualified supplier of CARC" or "CARC materials." *See* Affidavit of Joseph Hall, LHB's Vice President of Finance and Administration.

Defendant Hill Manufacturing Company is a Georgia corporation with its with its principal place of business in Atlanta, Georgia. Hill -- which produces soaps, cleansing agents, window cleaners, degreasers and other similar cleaning products -- similarly contends that it "has never produced, sold, delivered or shipped any CARC paint or other urethane-based products the United States military . . . [or] to anyone." Hill further avers that it does "not produce, and never [has] produced, any urethane-based products at all. As far as anyone can recall, we have never produced any paints ever in our 70+ year history." *See* Affidavit of Stewart Hillman, Hill's Chief Executive Officer.

* Plaintiff urges the Court to premise an exercise of personal jurisdiction on a stream of commerce "plus" theory.

That is, plaintiff argues that while CARC products may not be sold by defendants to the general public in Arkansas, the non-CARC products of one or more of these defendants can be found on shelves in Arkansas, and therefore, due process requires them to appear and defend plaintiff's claims in Arkansas. This is notwithstanding the uncontroverted contention that the alleged tortious conduct involved only CARC products which were applied on a military installation in Kentucky. The Court notes that, under the stream of commerce theory, due process is satisfied where a product manufacturer or distributor places a significant number of the product into the stream of commerce with the knowledge and expectation that the product would be distributed and purchased by consumers in the *forum* state. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980); *Asahi Metal Indus. Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 107 (1987); *see also Mason v. Mooney, supra* ("One who puts a product into the stream of commerce in such a fashion as to reasonably foresee its sale in a certain jurisdiction cannot complain of having to defend against claims in that jurisdiction arising out of the product's presence there.") This theory is inapplicable to the facts and circumstances of this case: there is no indication that any defendant placed CARC products into the general stream of commerce with the knowledge and expectation that ordinary consumers in Arkansas would purchase and apply them. Thus, it was not foreseeable to defendants that they would be haled into court in Arkansas by residents who purchased their products. Even more far removed is any conclusion that defendants could reasonably foresee being sued in the Arkansas courts by a Kentucky resident for a toxic tort occurring in connection with a specialized military product which was applied on a military base in Kentucky.

Moreover, the Supreme Court has not yet adopted plaintiff's proposed stream of commerce "plus" theory; the Court has thus far rejected the notion that a defendant who places any type of goods in the stream of commerce would be subject to nationwide jurisdiction without consideration of the type of product found, where it is found, and what type of and where the injury occurs. Along these lines, the Supreme Court has gone so far as to say that placement of a product into the forum's stream of commerce, without more, is generally not proof of purposefully directing conduct toward the forum state. *Asahi,* 480 U.S. at 112; *see also Barone v. Rich Bros. Interstate Display Fireworks,* 25 F.3d 610, 615 (8th Cir. 1994)(in globalized commerce, defendant whose product is distributed nationwide should reasonably anticipate being haled into court *by plaintiffs in their home states*)(emphasis added). Thus, the Court rejects plaintiff's notions to the contrary.

* The Court also notes that plaintiff has, in his response to the defendants' motions, appreciably expanded his arguments, stating not only that the defendants manufacture and distribute CARC products but that "each defendant manufactures products which contain ingredients contained in products identified as CARC." Defendants correctly note that this expanded and somewhat tenuous theory of liability (there is no suggestion that non-CARC products are responsible for plaintiff's injuries) has not been pled and cannot now defeat their properly pled motions.

* The Court expresses its view that Arkansas' interest in providing a forum for its residents is not triggered since no party to this litigation is a resident of this state. It would appear that Kentucky -- plaintiff's domicile and site of the alleged tort -- would have the strongest interest in the adjudication of this dispute. It would also appear that plaintiff

would have pursued the action in Kentucky but for the limitations period in that state.

* The Court does not have complete knowledge concerning the relative convenience or inconvenience of the parties and their witnesses should this action be tried in Arkansas. However, it would appear that trial in Arkansas would occasion a great deal of inconvenience to plaintiff in light of the fact what has been said above. Plaintiff's choice of such an inconvenient forum can, perhaps, be explained by the apparent fact that the limitations period had expired in Kentucky but had not in Arkansas.

Nevertheless, in the absence of any indication either way, this factor adds little to the court's analysis.

* Finally, the Court notes that plaintiff has filed a motion to amend his complaint and that defendants have objected to the same. While leave to amend under F.R.Civ. P. 15 should be freely granted, there is no automatic or absolute right to amend and leave may be denied where justified by "undue delay, bad faith on the part of the moving party, futility of the amendment or unfair prejudice to the opposing party." *United States v. Iowa,* 269 F.3d 932, 936 (8th Cir. 2001); *see also Meehan v. United Consumers Club Franchising Corp.,* 312 F.3d 909 (8th Cir. 2002). The Court has reviewed plaintiff's proffered "First Amended Complaint" and while it purports to add additional theories of liability, it adds nothing more to the jurisdictional equation and therefore, the Court finds that amendment would be futile and plaintiff's motion to amend denied.

5. The jurisdictional inquiry arises in every case and is essentially "a question of the power of a judicial forum to decide the issues brought before it." *Viam Corp.,* 84 F.3d at

428. Here, the Court has considered the defendants' challenge to jurisdiction and finds that plaintiff has not sustained his burden of establishing a prima facie case of personal jurisdiction. *First National Bank of Lewisville, Arkansas v. First National Bank of Clinton, Kentucky,* 258 F.3d 727, 729 (8th Cir. 2001); *Burlington Industries Inc. v. Maples Industries,* 97 F.3d 1100, 1102 (8th Cir. 1996). Plaintiff, a resident of Kentucky, alleges that he developed a brain tumor as the result of his work with CARC products while employed as a civilian at Fort Knox, Kentucky. When he could not sue in Kentucky, he filed in Arkansas. However, the Court does not believe that due process permits plaintiff to proceed against defendants who have insufficient contacts with the forum -- regardless of whether the forums' limitations period might save his action. While the non-CARC products of one or more defendants may be found in the stream of Arkansas commerce, CARC products are not. The Supreme Court has held that placing goods into the stream of commerce does not subject a defendant to nationwide jurisdiction -- there must be something more. Here, there is not.

6. Having found jurisdiction to be lacking, it is unnecessary to address the issue of venue although the Court expresses its opinion that venue is not proper in this district pursuant to 28 U.S.C. §1391.

7. For the reasons stated hereinabove, the Court finds that defendants' motions should be, and they hereby are, **granted and plaintiff's complaint is hereby dismissed with prejudice.**

IT IS SO ORDERED.

/s/ _____
Jimm Larry Hendren
United States District Judge

U.S. District Court
Western District of Arkansas
Filed October 3, 2003
Chris R. Johnson, Clerk

By:/s/ _____
June Rowland
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79(a), FRCP.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

ARKANSAS CODE OF 1987
ANNOTATED OFFICIAL EDITION 2004

TITLE 16. PRACTICE, PROCEDURE, AND COURTS
SUBTITLE 1. GENERAL PROVISIONS
CHAPTER 4. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT

A.C.A. § 16-4-101 (2003)

§ 16-4-101. Personal jurisdiction of Arkansas courts

A. Definition of "Person". As used in this section, "person" includes an individual or his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this state.

B. Personal Jurisdiction. The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution.

C. Service. When the exercise of personal jurisdiction is authorized by this section, service may be made either within or outside this state.

D. Inconvenient Forum. When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

FEDERAL RULES OF CIVIL PROCEDURE
III. PLEADINGS AND MOTIONS

Fed Rules Civ Proc R 12 (2004)

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3) (A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters the periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if

a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion For More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or

ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleadings. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a

responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CASE NO. 03-5088

[Filed August 6, 2003]

ROBERT L. DEVER	)
PLAINTIFF	)
	)
v.	)
	)
HENTZEN COATINGS, INC.	)
THE SHERWIN-WILLIAMS COMPANY	)
W.M. BARR & COMPANY	)
WILLIMA M. BARR & COMPANY	)
LHB INDUSTRIES, INC.	)
HILL MANUFACTURING COMPANY, INC.	)
NILES CHEMICAL PAINT COMPANY, INC.	)
CHASE PRODUCTS COMPANY	)
DEFENDANTS	)
	)

MOTION TO DISMISS OF DEFENDANT HENTZEN COATINGS, INC.

* * * *

Comes now the Defendant HENTZEN COATINGS, INC., by and through its attorneys, Laser Law Firm, and for its Motion to Dismiss pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure states:

1. Defendant Hentzen Coatings, Inc. is a Wisconsin corporation in good standing with its principal place of business in Milwaukee, Wisconsin.

2. Plaintiff is a citizen of Kentucky and resides in Hardin, County, Kentucky.

3. Plaintiff alleges he developed health problems as a result his occupational exposure to chemical agent resistant coating ("CARC") paint products.

4. Plaintiff's only alleged exposure to CARC occurred in Fort Knox, Kentucky during his employment at the Fort Knox Army Base.

5. Plaintiff has brought this action in the United States District Court for the Western District of Arkansas with no basis to support jurisdiction in Arkansas.

6. Plaintiff bears the burden of proving that Arkansas has personal jurisdiction over Defendant Hentzen Coatings, Inc.

7. Defendant Hentzen Coatings, Inc. lacks sufficient minimal contacts with the State of Arkansas needed to establish personal jurisdiction.

8. Plaintiff's Complaint against Hentzen Coatings, Inc. should be dismissed due to lack of personal jurisdiction over Hentzen Coatings, Inc.

9. Plaintiff's Complaint should be dismissed against Hentzen Coatings, Inc. due to improper venue under Rule 12(b)(3) of the Federal Rules of Civil Procedure.

10. Plaintiff's claim also fails to state sufficient facts upon which relief can be granted under Rule (b)(6) of the Federal Rules of Civil Procedure.

11. Defendant Hentzen Coatings, Inc. incorporates and adopts by reference the arguments in support of dismissal as set forth in the prior Motions and Briefs of Defendants The Sherman Williams Company, W. M. Barr & Company, Niles Chemical Paint Company Inc., & Chase Products Company Products as if set forth word for word herein.

WHEREFORE, Defendant Hentzen Coatings, Inc. prays that its Motion to Dismiss be granted, that Plaintiff's Complaint be dismissed, and that it recover its cost and all other just and proper relief to which it may be entitled.

Respectfully submitted,

LASER LAW FIRM, P.A.
101 S. Spring Street, Suite 300
Little Rock, Arkansas 72201-2488
(501) 376-2981

BY: /s/ _____
Keith M. McPherson
keithmcpherson@laserlaw.com
BAR ID #91194

CERTIFICATE OF SERVICE

I, Keith M. McPherson, hereby certify that a copy of the above and foregoing pleading has been served on all attorneys of record as listed below this 6 day of August, 2003.

Kenneth L. Sales
Joseph D. Satterley
Paul J. Kelley
1900 Waterfront Plaza
325 W. Main Street
Louisville, KY 40202

Charles A Banks
Paul H. Wood
Armstrong Allen
P.O. Box 251310
Little Rock, AR 72225-1310

R. Jeff Conner
207 W. Center Street
Fayetteville, AR 72701

Randy Jackson
Jones, Jackson & Moll
P.O. Box 2023
Ft. Smith. AR 72902

Sam Laser
Laser Law Firm, LLC
101 S Spring Street, Ste. 300
Little Rock, AR 72201-2488

/s/ _____
Keith M. McPherson

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

Case No. 03-5088

[Filed August 6, 2003]

ROBERT L. DEVER)
PLAINTIFF)
)
v.)
)
HENTZEN COATINGS, INC.)
THE SHERWIN-WILLIAMS COMPANY)
W.M. BARR & COMPANY)
WILLIMA M BARR & COMPANY)
LHB INDUSTRIES, INC.)
HILL MANUFACTURING COMPANY, INC.)
NILES CHEMICAL PAINT COMPANY, INC.)
CHASE PRODUCTS COMPANY)
DEFENDANTS)

BRIEF IN SUPPORT OF DEFENDANT HENTZEN COATINGS, INC. MOTION TO DISMISS

Plaintiff filed this action in the United States Court for the Western District of Arkansas seeking damages from seven corporate Defendants for personal injuries he sustained while working as a civilian employee in Fort Knox, Kentucky. Plaintiff's injuries allegedly occurred as a result of his occupational exposure to chemical agent resistant coating ("CARC") paint products. Plaintiff's Complaint fails to allege any of his alleged exposure to the CARC paint products occurred in Arkansas. Plaintiff's Complaint also fails to allege any of the CARC paint products to which he was allegedly exposed were produced, manufactured, or supplied from any Arkansas source.

Defendant Hentzen Coatings, Inc. is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. Defendant Hentzen Coatings, Inc. does not maintain a residence or place of business within the state of Arkansas. Further, Hentzen Coatings, Inc. has no offices, inventory, bank accounts, real estate, personal property, employees for agents located in Arkansas. Finally, Hentzen Coatings, Inc. does not have a registered agent of service with the Arkansas Secretary of State's office.

ARGUMENT

There is insufficient basis for this Court to exercise general or specific personal jurisdiction over Defendant Hentzen Coatings, Inc. Since Plaintiff's Complaint fails to allege facts supporting the contention this cause of action specifically arises out of Defendant's contacts with Arkansas, the exercise of jurisdiction must be one of general jurisdiction. This Defendant lacks sufficient minimum contacts with Arkansas to support the exercise of personal jurisdiction over it by the Court. While Hentzen Coatings, Inc. may have simple commercial contacts with Arkansas,

they are entirely unrelated to Plaintiff's alleged cause of action or injuries, and insufficient to give rise to general or specific jurisdiction over Hentzen. *See Burlington Industries Inc. vs. Maples Industries*, 97 F. 3d 110, 1101(8th Cir. 1996). Further, this Defendant's contacts are not continuous or systematic and fail to support a claim of general jurisdiction. *Epps v. Stewart Information Services Corp.*, 327 F. 3d 642, 648 (8th Cir. 2003).

In the interest of judicial economy and brevity Hentzen Coatings, Inc. relies upon the legal citations, authority and arguments regarding lack of jurisdiction previously provided to the Court in the Briefs supporting Motions to Dismiss filed by Defendants The Sherwin-Williams Company, W.M. Barr & Company, Niles Chemical Paint Company, and Chase Products.

Venue is also improper in Arkansas. As noted previously, and confirmed by the allegations of Plaintiff's Complaint, neither the Plaintiff nor any of the seven corporate Defendants reside in Arkansas. Further, none of the alleged occupational exposures giving rise to Plaintiff's alleged injury occurred in Arkansas. In fact, Plaintiff was a resident of Kentucky, and employed in Kentucky when he was allegedly exposed to the Defendant's CARC paint products. As such, venue is improper in the Western District of Arkansas.

Again, in the interest of judicial economy and brevity, Hentzen Coatings, Inc. relies upon all of the citations and legal authority previously provided to the Court in the several Motions to Dismiss by Defendants The Sherwin-Williams Company, W.M. Barr & Company, Niles Chemical Paint Company, Inc. and Chase Products Company.

CONCLUSION

Plaintiff's Complaint fails to properly plead sufficient facts giving rise to personal jurisdiction or venue in the Court against Hentzen Coatings, Inc. and should be dismissed.

Respectfully submitted,

LASER LAW FIRM, P.A.
101 S. Spring Street, Suite 300
Little Rock, Arkansas 72201-2488
(501) 376-2981

BY:_____
Keith M. McPherson
keithcpherson@laserlaw.com
BAR ID #91194

CERTIFICATE OF SERVICE

I, Keith M. McPherson, hereby certify that a copy of the above and foregoing pleading has been served on all attorneys of record as listed below this 6 day of August, 2003.

Kenneth L. Sales
Joseph D. Satterley
Paul J. Kelley
1900 Waterfront Plaza
325 W. Main Street
Louisville, KY 40202

Charles A. Banks
Paul H. Wood
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R. Jeff Conner
207 W. Center Street
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Randy Jackson
Jones, Jackson & Moll
P.O. Box 2023
Ft. Smith, AR 72902

Sam Laser
Laser Law Firm, LLC
101 S. Spring Street, Ste. 300
Little Rock, AR 72201-2488

/s/ _____
KEITH M. McPHERSON

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

Case No. 03-5088

[Filed May 7, 2003]

ROBERT L. DEVER
210 Claudie Avenue
Elizabethtown, KY 42701
PLAINTIFF

v.

HENTZEN COATINGS, INC.
6937 West Mill Road
Milwaukee, WI 53218
Serve: Albert L. Hentzen
6937 West Mill Road
Milwaukee, WI 53218

THE SHERWIN-WILLIAMS COMPANY
101 Prospect Avenue NW
Cleveland, Ohio 44115
Serve: Service Agent
101 Prospect Avenue NW
Cleveland, OH 44115

W. M. BARR & COMPANY
2105 Channel Avenue
Memphis, TN 38113
Serve: Michael S. Cooley,
2105 Channel Avenue
Memphis, TN 38113

LHB INDUSTRIES, INC.
10440 Trenton Avenue
St. Louis, MO 63132
Serve: Joseph J. Hull
10440 Trenton Avenue
St. Louis, MO 63132

HILL MANUFACTURING COMPANY, INC.
1500 Jonesboro Road SE
Atlanta, GA 30315
Serve: Kevin Levitas
1500 Jonesboro Road SE
Atlanta, GA 30315

NILES CHEMICAL PAINT COMPANY, INC.
6546 Mercantile Way
Lansing, MI 48911
Serve: M. Sherman Drew, Jr.
225 Fort Street
Niles, MI 49120

CHASE PRODUCTS COMPANY)
20th Street and Gardner)
Broadview, IL 60153)
Serve: R. W. Svendsen)
20h Street and Gardner)
Broadview, Illinois 60153)
)
DEFENDANTS)
)

COMPLAINT

*****

COMES NOW **Robert L. Dever** ("Plaintiff"), by counsel and for his Complaint against **Hentzen Coatings, Inc., W. M. Barr & Company, LHB Industries, Inc., Hill Manufacturing Company, Inc., Niles Chemical Paint Company, Inc., Chase Products Company** (collectively known as "Defendants"), hereby states as follows:

PARTIES

1. At all pertinent times herein, the Plaintiff was and remains an adult and a citizen of Kentucky and resides in Hardin County, Kentucky.

2. At all pertinent times herein, Defendant Henzten Coating, Inc. was and remains a Wisconsin corporation in good standing with its principal place of business, located in Milwaukee, Wisconsin.

3. At all pertinent times herein, Defendant The Sherwin-Williams Company was and remains an Ohio corporation in good standing with its principal place of business, located in

Cleveland, Ohio, and is qualified to do business, is doing business within the State of Arkansas, and is subject to service of process within this State.

4. At all pertinent times herein, Defendant W.M. Barr & Company was and remains a Tennessee corporation in good standing with its principal place of business, located in Memphis, Tennessee.

5. At all pertinent times herein, Defendant LHB Industries, Inc. was and remains a Missouri corporation in good standing with its principal place of business, located in St. Louis, Missouri.

6. At all pertinent times herein, Defendant Hill Manufacturing Company, Inc. was and remains a Georgia corporation in good standing with its principal place of business, located in Atlanta, Georgia.

7. At all pertinent times herein, Defendant Niles Chemical Paint Company, Inc. was and remains a Michigan corporation in good standing with its principal place of business, located in Lansing, Michigan.

8. At all pertinent times herein, Defendant Chase Products Company was and remains an Illinois corporation in good standing with its principal place of business, located in Maywood, Illinois.

9. The Defendants are all corporations or other business entities which have been and/or are manufacturing, selling, distributing or otherwise placing in the stream of commerce, paint products, specifically chemical agent resistant coating ("CARC") paint products within the State of Arkansas.

JURISDICTION AND VENUE

10. There is complete diversity of citizenship between Plaintiff and Defendants. The amount in controversy exceeds $75,000.00 exclusive of costs, interest and disbursements. Jurisdiction is based upon diversity of citizenship and amount in controversy.

11. This Court has original jurisdiction of Plaintiff's claims pursuant to 28 U.S.C. §1332.

12. This Court has personal jurisdiction over the out-of-state defendants pursuant to Ark. Code Ann. §16-4-101.B. (the long-arm statute), as these defendants have caused tortuous injuries to Robert Dever by the aforementioned acts omissions and have transacted business in the state, supplied their products in the state and derived substantial revenue from goods and manufactured products used in this State. The contacts of all defendants with the State of Arkansas through the sale and consumption of their respective products is sufficient to allow exercise of personal jurisdiction of them, and each of them, consistent with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution.

13. Venue in the United States District Court, Western District of Arkansas is proper under 29 U.S.C. §1391(a)(1) & (3) and (c), as each Defendant is subject to personal jurisdiction in the Western District of Arkansas.

FACTS

14. Plaintiff developed a meningiotheliomatus meningioma of the brain as a result of his occupational exposure to CARC paint products, as a civilian employee at

the Fort Knox Army Base in Fort Knox, Kentucky, manufactured, distributed, sold or otherwise placed in the stream of commerce by the Defendants herein. During Plaintiff's employment between 1993 and 2000, he worked in close proximity to areas where CARC paint was applied to military vehicles.

15. Plaintiff was diagnosed with brain cancer on April 10, 2000; however, did not learn of the cause of the cancer until May of 2000.

16. As a result of developing a brain tumor related to his CARC paint exposures, the Plaintiff has undergone great physical pain, mental anguish, shock to his nerves and nervous system and severe anxiety due to the development of his brain tumor and the subsequent surgery and permanent effects resulting from the brain surgery.

17. The Defendants have for many years manufactured, sold, distributed or otherwise placed in the stream of commerce CARC paint products.

18. The Defendants knew that CARC paint products contained cancer-causing solvents and chemicals.

19. The Defendants knew that the Plaintiff, who was exposed to their CARC paint products, would be exposed to substantial amount of cancer-causing CARC paint products at the workplace.

20. The CARC paint products manufactured and sold by the Defendants reached the Plaintiff and other workers who worked with CARC paint products, without any substantial change or alteration from their original form.

21. The Defendants have known that persons such as the Plaintiff could be exposed to dangerous and hazardous amounts of solvents contained in CARC paint products during the ordinary foreseeable use of their CARC paint product.

22. The CARC paint products were sold by the Defendants in their defective condition unreasonably dangerous to the Plaintiff.

23. The Defendants intentionally and willfully concealed from the public their knowledge of the hazardous nature of CARC paint product solvents, and intentionally and willfully failed to warn persons such as the Plaintiff of the dangers inherent in the handling and general exposure to their CARC paint products.

24. The Defendants impliedly warranted that their CARC paint products were reasonably fit for use and safe for their intended purposes.

25. Persons such as the Plaintiff did not know of the nature and extent of the danger presented by the ordinary and foreseeable use of the Defendants' CARC paint products.

CLAIMS FOR RELIEF- COUNT I

26. Plaintiff restates and reiterates herein all previous paragraphs.

27. The aforesaid actions of the Defendants result in their strict liability and tort for selling and placing into the stream of commerce CARC paint products, which reach the Plaintiff in a defective condition, unreasonably dangerous, without substantial change or alteration.

CLAIMS FOR RELIEF- COUNT II

28. Plaintiff restates and reiterates herein all previous paragraphs.

29. The aforesaid actions of the Defendants constitute negligence and that there has been a failure to use reasonable and ordinary care under the circumstances, and this failure has been the proximate cause of the bodily harm suffered by the Plaintiff.

CLAIMS FOR RELIEF- COUNT III

30. Plaintiff restates and reiterates herein all previous paragraphs.

31. The aforesaid actions of the Defendants constitute a breach of the implied warranty of merchantability in that the Defendants sold their products to employers of the Plaintiff and impliedly warranted to the Plaintiff that their CARC paint products were reasonably fit for use and safe for their intended purposes and, in fact, the CARC paint products were defective, dangerous, unfit for use and unsafe for their intended purposes.

CLAIMS FOR RELIEF - COUNT IV

32. Plaintiff restates and reiterates herein all previous paragraphs.

33. The aforesaid action of the Defendants constitute malicious, willful and wanton conduct and gross negligence, making them liable to the Plaintiff for punitive damages.

CLAIMS FOR RELIEF - COUNT V

34. Plaintiff restates and reiterates herein all previous paragraphs.

35. As a direct and proximate result of the gross negligence, willful misconduct, breach of warranty and strict liability, Plaintiff was caused to contract diseases and injuries to his body system and the Defendants are liable for punitive damages.

WHEREFORE, the Plaintiff, Robert L. Dever, respectfully requests:

1. Judgment against each Defendant, individually, jointly and separately for an amount in excess of Seventy-Five Thousand Dollars ($75,000.00) for compensatory damages;

2. Punitive damages;

3. His costs herein expended;

4. Trial by jury of all issues so triable;

5. Any and all other relief to which he may be entitled.

SALES, TILLMAN, WALLBAUM, CATLETT & SATTERLEY

/s/ _____

KENNETH L. SALES
JOSEPH D. SATTERLEY
PAUL J. KELLEY
1900 Waterfront Plaza
325 W. Main Street
Louisville, KY 40202
(502) 589-5600

/s/ _____

R. JEFF CONNER ABA 98187
207 W. Center Street
Fayetteville, AR 72701
(479) 443-8080
Co-counsel for Plaintiff

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

Case No. 03-CV-5088

ROBERT L. DEVER	)
PLAINTIFF	)
	)
v.	)
	)
HENTZEN COATINGS, INC.;	)
THE SHERWIN-WILLLIAMS COMPANY;	)
W.M. BARR & COMPANY;	)
LHB INDUSTRIES, INC;	)
HILL MANUFACTURING COMPANY, INC.;	)
NILES CHEMICAL PLANT COMPANY, INC.;	)
CHASE PRODUCTS COMPANY	)
DEFENDANTS	)
	)

AFFIDAVIT OF

I, Michael S. Cooley, after being duly sworn in accordance of law, do hereby state as follows:

1. I am the Director of Legal and Regulatory Affairs for W.M. Barr & Company, Inc. I have been employed at Barr since May of 1996.

2. I am knowledgeable of the present and historical operations of Barr.

3. Barr is a chemical manufacturing company with its offices and two manufacturing plants located in Memphis, Tennessee. Barr is a Tennessee corporation and is not registered to do business in Arkansas.

4. Barr has no offices, plants, inventory, real estate, or bank accounts in Arkansas. Barr has no sales force or employees who work in Arkansas.

5. There is Barr product that is sold and on shelves in Arkansas. However, Barr sells its product from Memphis to various retailers and specialty industries who in turn sell them to consumers or use them in commercial applications.

6. To the best of its knowledge, Barr has never manufactured, distributed, or sold any chemical agent resistant coating ("CARC") paint products. To the best of its knowledge, Barr is not a manufacturer, distributor, or seller of paint products under the CARC specification or under the CARC qualified product lists promulgated by the United States Army Research Laboratory/Department of Defense.

FURTHER AFFIANT SAITH NOT.

/s/ _____
Michael S. Cooley

STATE OF TENNESSEE
COUNTY OF SHELBY

Subscribed and sworn to before me this 30 day of May, 2003.

/s/ _____
Notary Public

My commission expires:

October 15, 2003

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

Case No. 03-5088

ROBERT L. DEVER)
PLAINTIFF)
)
v.)
)
HENTZEN COATINGS, INC.;)
THE SHERWIN-WILLIAMS COMPANY;)
W.M. BARR & COMPANY;)
LHB INDUSTRIES, INC.;)
HILL MANUFACTURING COMPANY, INC.;)
NILES CHEMICAL PAINT COMPANY, INC.;)
CHASE PRODUCT COMPANY)
DEFENDANTS)

AFFIDAVIT

STATE OF MICHIGAN)
) SS:
COUNTY OF BERRIEN)

I, M. Sherman Drew Jr., of Niles, Michigan, being first duly sworn, state the following:

1. I have personal knowledge of and am competent to testify on the matters stated herein.

2. I am the Executive Vice President and General Counsel for Defendant NCP Coatings Inc. formerly Niles Chemical Paint Company Inc. Niles Chemical Paint Company, Inc. changed its name to "NCP Coatings Inc." in January 2001.

3. NCP Coatings Inc. (NCP) is a producer of specialty, industrial, and military coatings.

4. NCP is an Indiana corporation with its primary production and sales facility in Niles, Michigan. NCP has additional manufacturing capabilities in Mishawaka, Indiana.

5. NCP has been a manufacturer of chemical agent resistant coating paint products specially made for the United States military according to government specifications and pursuant to contract with the General Services Administration (GSA). These products were only sold to U.S. military suppliers and did not enter the consumer marketplace.

6. The only locations where these paint products were sent pursuant to GSA contract were three military depots located in Stockton, California; Burlington, New Jersey; and Albany, Georgia.

7. Under the government contracts pursuant to which these products were supplied to the U.S. military, NCP had no expectations or knowledge as to where these products would ultimately be located or used.

8. NCP has no place of business in Arkansas.

9. NCP is not registered as a foreign corporation to do business in Arkansas.

10. NCP has no offices, inventory, bank accounts, real estate, personal property, employees, or agents in Arkansas.

Further, affiant sayeth not.

/s/ _____
M. Sherman Drew, Jr.

Subscribed and Sworn to before me this 17th day of June 2003.

(SEAL)

/s/ _____
Notary Public
Cynthia Wisdom

My Commission Expires:

05/29/04

Berrien County, Michigan

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Case No. 03-5088

ROBERT L. DEVER)
PLAINTIFF)
)
v.)
)
HENTZEN COATINGS, INC.;)
THE SHERWIN-WILLIAMS COMPANY;)
W.M. BARR & COMPANY;)
LHB INDUSTRIES, INC.;)
HILL MANUFACTURING COMPANY, INC.;)
NILES CHEMICAL PAINT COMPANY, INC.;)
CHASE PRODUCT COMPANY;)
DEFENDANTS)

AFFIDAVIT OF JUDITH A. ALBAZI

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

I, Judith A. Albazi, of Broadview, Illinois, being first duly sworn, state the following:

1. I have personal knowledge and am competent to testify on the matters stated herein.

2. I am Vice President of operations for Defendant Chase Products Company.

3. Chase Products Company is an Illinois corporation with its primary place of business in Broadview, Illinois.

4. Chase Products Company does not now, nor has it ever, had the ability to make the two-part epoxy catalyst system required of Chemical Agent Resisting Coating ("CARC").

5. Chase Products Company has never made or sold CARC paints.

6. Chase Products Company has no place of business in Arkansas.

7. Chase products Company is not registered as a foreign corporation to do business in Arkansas.

8. Chase Products Company has no offices, inventory, bank accounts, real estate, personal property, employees, or agents in Arkansas.

Further, affiant sayeth not.

/s/_____
Judith A. Albazi

Subscribed and sworn to before me this 30th day of June 2003.

(SEAL) /s/_____
Laura Ann Reihsmann
Notary Public

My Commission Expires:

08/21/2006

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS

CASE NO. 03-CV-5088

ROBERT L. DEVER	)
PLAINTIFF	)
	)
v.	)
	)
HENTZEN COATINGS, INC., et al	)
DEFENDANTS	)
	)

AFFIDAVIT OF PAUL J. KELLEY

Comes the Affiant, PAUL J. KELLEY, and after first being duly sworn, states:

1. That I am an associate in the law firm of Sales, Tillman, Wallbaum, Catlett and Satterley;

2. That I and other members of this firm have researched CARC paint products and their hazardous ingredients;

3. That I and other members of this firm have researched the material safety data sheets for products manufactured by all Defendants in this case, in particular, W.M. Barr, Sherwin-Williams, NCP,

Chase Products, LHB Industries and Hill Manufacturing;

4. That according to information contained on http://www.gulflink.osd.mil/carc_paintii/carc__paint_ii-tabd.htm, common ingredients contained in CARC products include: PM Acetate, Butyl Acetate, Methyl Propyl Ketone, Methyl Ethyl Ketone, Xylene, n-Butyl Acetate, Toluene, Xylene, 1-Methoxy, and 2-Propanol Acetate;

5. That according to the material safety data sheet found at http://a1. Solidweb.com/ps/LHB 1/customer.nsf?opendatabase, LHB Industries manufactures a product identified as TT-E-516A So Sure Black (37038), which contains Acetone, Propane, Toluene, VM&P Naptha, n-butane, Talc, 2-Methyl Propane, Propylene Glycol Monomethyl Ether Acetate and Cristobalite;

6. That according to the material safety data sheet found at http://a1.Solidweb.com/ps/LHB1/customer.nsf? opendatabase, LHB Industries manufactures a product identified as TT-E-516A So Sure Olive Drab (34088), which contains Acetone, Propane, Toluene, VM&P Naptha, N–butane, Talc, 2-Methyl Propane, Isobutyle Acetate, Cristobalite, Isobutyl alcohol and n-Butyl Acetate;

7. That according to the material safety sheet found at http:/a1.Solidweb.com/ps/LHB1/customer.nsf?open database, LHB Industries manufactures as product identified a TT-E-516A So Sure Gray (36375), which contains Acetone, Toluene, Propane, VM&P Naptha,

Titanium Dioxide, n-butane, 2-Methyl Propane, and Cristobalite;

8. That a material safety data sheet for a product manufactured by LHB Industries identified as OLIVE DRAB 24084 Aerosol, lists the following ingredients for that product: Xylene, Toluene, Acetone, Propane, Isobutane, N-butane, Mineral Spirits, Lead, Aromatic, Red Lead Grade, Moly Orange, VOC: 494 G/L and several other ingredients;

9. That according to the material safety data sheet found at http://www.msdssolutions.com/en/, Hill Manufacturing Co., Inc. manufactures a product identified as 5018 Graffiti-X which contains Toluene, Methyl Ethyl Ketone, Propane, Butane, Diacetone Alcohol and Acetone;

10. That according to the material safety data sheet found at http://www.msdss.com/SearcgPage/.asp, Hill Manufacturing manufactures a product identified as 5065 Gold Zinc Galvanize which contains Toluene and Solvent Naptha;

11. That according to the material safety data sheet found at http://www.msdss.com/SearchPage/.asp, Hill Manufacturing manufactures a product identified as 5080 Spray Steel Coating which contains Toluene, Kerosene, Hydrotreated, Propane/Isobutane Blend and Methane Dichloro;

12. That these products contain many of the same ingredients as those identified as CARC products;

13. That CARC paint products are largely used on military vehicles.

14. That further discovery is necessary in the above-styled matter in order to determine the bases for the statements made in affidavits tendered by Defendants LHB Industries and Hill Manufacturing that those respective defendants do not manufacture CARC products.

Further, Affiant sayeth not.

/s/ _____
PAUL J. KELLEY

STATE OF KENTUCKY)
) ss
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by Paul J. Kelley on this ___ day of August, 2003.

My commission expires 05/14/2007

/s/ _____
Mary J. Wentworth
NOTARY PUBLIC